GOVERNMENT OF THE STATE OF PENANG v. MINISTER OF HOME AFFAIRS & ORS

HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[JUDICIAL REVIEW NO: 25-8-01-2015]
13 OCTOBER 2015

ADMINISTRATIVE LAW: *Judicial review – Application for – Establishment of Penang Voluntary Patrol Unit (PPS) by Government of Penang – Declaration by Minister of Home Affairs that PPS an unlawful society – Whether PPS lawfully and properly established pursuant to s. 101(v) of Local Government Act 1976 – Whether PPS a society within meaning of s. 5(1) of Societies Act 1966 – Whether Minister of Home Affairs acted ultra vires of Local Government Act 1976 and Societies Act 1966*

Penang Voluntary Patrol Unit ('PPS') was established in 2011 by an order of the applicant, *ie*, Government of the State of Penang pursuant to a Penang State Executive Council meeting held on 27 April 2011. Several members of the PPS who participated in a march in conjunction with the Merdeka Day celebrations in Penang were arrested. Subsequent to the arrests, the first respondent declared PPS as an unlawful society pursuant to s. 5(1) of the Societies Act 1966 ('Act 1966') based on his opinion that PPS was being used for purposes prejudicial to public order. The applicant later discovered that an order dated November 2014 declaring PPS as an unlawful society was issued and gazetted. Thus, the applicant filed the present application for leave to commence proceedings under O. 53 rr. 2 and 3 of the Rules of Court 2012 ('ROC') and sought, amongst others: (i) a declaration that PPS was lawfully and properly established by the applicant pursuant to s. 101(v) of the Local Government Act 1976 ('Act 1976'); (ii) a declaration that PPS was not a society within the meaning of the Act; and (iii) an order of *certiorari* to quash the order dated 3 November 2014 by the first respondent. In response, the respondent filed a written submission based on a preliminary objection to the applicant's application. The respondents submitted, amongst others, that the definition of the local authority did not include the State Government. Therefore, the reliance of the applicant on s. 101(v) of Act 1976 to quash the decision of the first respondent was misconceived and devoid of merit. The applicant, in reply to the preliminary objections, *inter alia*, contended that the preliminary objection raised by the respondent only holds true for the prayer which was for a declaration that the PPS was lawfully and properly established by the applicant pursuant to s. 101(v) of Act 1976 *ie*, prayer (i). The applicant therefore submitted that prayer (i) could be severed from the rest of the prayers for the court to decide whether to grant leave or not.

Held (dismissing applicant's application with no order as to costs):

(1) The PPS could not exist in a vacuum. If it is not a society and therefore need not be registered under the Act 1966, then it has to be set up and derive its existence and authority from some form of legislation or law. The term 'society' under s. 2 of Act 1966 also includes an association of seven or more persons. The employment of the phrase 'includes' connotes that the subjected categories are not closed. (para 25)

(2) Until a local society is registered under Act 1966, no person shall, without a written permission of the Registrar, organise or take part in any activity of or on behalf of the society. If the PPS was set up pursuant to Act 1976, then they may be excepted from registering the association under Act 1966 but not otherwise. If they were so excepted, they would arguably fall within s. 2(b) of Act 1966. (paras 26 & 27)

(3) As the supporting documents relied upon by the applicant showed that the decision to set up the PPS was made pursuant to the decision of the Penang State Government *ie*, the applicant and it is clear that the Penang State Government is not a 'local authority', it stands to reason that the PPS could not have been set up pursuant to Act 1976. (para 28)

(4) Since the State Government does not qualify as a local authority within the definition of Act 1976, the PPS could not be said to be set up pursuant to s. 101(v) of Act 1976 as the applicant could not show by way of documentary evidence or otherwise that it had given the requisite directions under s. 9 of Act 1976. The PPS could not have been set up pursuant to the provisions of Act 1976. Therefore, the first respondent had not acted *ultra vires* of Act 1976 and Act 1966 in making the order dated 3 November 2014 declaring PPS an unlawful society. (para 34)

(5) The court failed to see how prayer (i) could be severed or taken separately from the rest of the prayers which all hinge upon the outcome to prayer (i). The argument canvassed by the applicant must therefore fail. The application by the applicant for leave is therefore a non-starter. (paras 38 & 42)

Case(s) referred to:

Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor [1997] 4 CLJ 725 HC ***(refd)***

Dato' Ambiga Sreenevasan & Ors v. Menteri Dalam Negeri & Ors [2012] 7 CLJ 43 HC ***(refd)***

Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional [2015] 3 AMR 35 CA ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 27(1)
Interpretation Acts 1948 and 1967, s. 3
Local Government Act 1976, ss. 2, 9, 101(v)
Societies Act 1966, ss. 2(b), 5(1), 6(3)

For the applicant - Ambiga Sreenevasan (Quah Su Enn with her); M/s Sreenevasan & Co
For the respondents - Suzana Atan; SFC

Reported by Sandra Gabriel

JUDGMENT

Collin Lawrence Sequerah JC:

Introduction

[1] Pasukan Peronda Sukarela Pulau Pinang ("Penang Voluntary Patrol Unit") (PPS) was established in 2011 by an order of the applicant pursuant to a Penang State Executive Council (EXCO) meeting held on 27 April 2011.

[2] The first respondent declared PPS as an unlawful society pursuant to s. 5(1) of the Societies Act 1966 (Societies Act) based on his opinion that PPS was being used for purposes prejudicial to public order.

[3] An order dated 3 November 2014 declaring PPS an unlawful society pursuant to s. 5(1) of the Societies Act was issued and gazetted.

[4] The applicant thus filed this application for leave for the following:

> That the Applicant be granted leave to commence proceedings under Order 53 Rules 2 and 3 of the Rules of Court, 2012 for the following relief:
>
> (1) A Declaration that Pasukan Peronda Sukarela ("PPS") was lawfully and properly established by the Applicant pursuant to Section 101(v) of the Local Government Act 1976;
>
> (2) A Declaration that PPS is not a society within the meaning of the Societies Act 1966;
>
> (3) An Order of *Certiorari* to remove into this Court for the purposes of being quashed forthwith the Order dated 3-11-2014 ("the Impugned Order") by the 1st Respondent purportedly declaring PPS an unlawful society;
>
> (4) An Order of Prohibition prohibiting the Respondents, their servants, officers, agents or otherwise howsoever from:
>
> (i) Entering any of the premises of the PPS;
>
> (ii) Searching any of the premises of the PPS; and
>
> (iii) Arresting and/or detaining any member of PPS and seizing any property belonging to PPS.
>
> (5) An Order of *Mandamus* compelling the Respondents, their servants, officers, agents or otherwise howsoever to release to PPS all vests, equipment, seals, insignia, arms, document or other object whatsoever whether or not bearing the logo and words PPS belonging to the Applicant;

(6) An Order pursuant to Order 53 Rule 3(5) of the Rules of Court, 2012 staying the Impugned Order pending the final disposal of this application;

(7) General damages;

(8) Aggravated and/or exemplary damages;

(9) Provision be made so to the costs of this application; and

(10) Such further or other relief as this Honourable Court considers just.

Applicant's Submissions

[5] Pasukan Peronda Sukarela Pulau Pinang ("Penang Voluntary Patrol Unit") (PPS) was established in 2011 by an order of the applicant, ie, Government of the State of Penang (pursuant to a Penang State Executive Council (EXCO) meeting held on 27 April 2011 proposing the formation of the same) with the intention of assisting the applicant, the Royal Malaysian Police Force (PDRM) and other government agencies including state government agencies, local authorities and other law enforcement agencies in Penang in reducing crime through community policing and in the management of emergencies and natural disasters.

[6] The role of PPS is solely to complement the PDRM and other government agencies and not to replace them. In support of this contention the applicant submitted the following:

(i) its members carry out their duties on a purely voluntary basis and receive no form of remuneration;

(ii) their powers are limited to those conferred by s. 27(1) of the Criminal Procedure Code, ie, to make a citizen arrest(s); and

(iii) they do not possess the same enforcement powers as PDRM.

[7] Since their inception in 2011, PPS has always been supported by PDRM and other government agencies by way of their attendance of various activities organised by PPS which even include the training of PPS members.

[8] On 31 August 2014, a total of *inter alia* 154 out of 200 PPS members who participated in a march of a Penang state level parade held at the Esplanade, Penang in conjunction with the Merdeka Day celebrations (Merdeka Day celebrations) were arrested.

[9] Subsequently, the Chairman of PPS, Phee Boon Poh, Chief Co-ordinating Officer Manickam a/l Alagappan, Chairman of PPS Committee in the constituency of Seri Delima, RSN Rayer and Tanjung MP YB Bg Wei Aik were also arrested in connection with the same.

[10] PPS was allowed to participate in the Merdeka Day celebrations in 2011, 2012 and 2013 and did so without any untoward incident until 2014.

[11] Following the abovementioned arrests, the first respondent declared PPS an unlawful society pursuant to s. 5(1) of the Societies Act 1966 (Societies Act) based on his opinion that PPS was being used for purposes prejudicial to public order.

[12] The applicant later discovered (without any formal notification) that an order dated 3 November 2014 declaring PPS an unlawful society pursuant to s. 5(1) of the Societies Act was issued and gazetted.

Respondent's Submissions

[13] The respondent's have not seen fit to file any affidavit in reply to the applicant's affidavit. They are instead relying on a preliminary objection to the applicant's application. They have filed in a written submission to support their objection.

[14] They submit that the decision which forms the basis of this application is the first respondent's (the Minister) order made pursuant to his power conferred by sub-s. 5(1) of the Societies Act 1966 which declared the Pasukan Peronda Sukarela Pulau Pinang (PPS) an unlawful society with effect from 3 November 2014 as the Minister is of the opinion that the PPS is being used for purposes to public order.

[15] They contend that from the perusal of the cause papers filed by the applicant, this application is frivolous and vexatious. They submit that whereas the declarations that the applicant is seeking, *inter alia*, that the PPS was lawfully and properly established by the applicant pursuant to s. 101(v) of the Local Government Act 1976 and that PPS is not a society within the meaning of the Societies Act 1966, the supporting documents show that the PPS was agreed to be established during a meeting of the Majlis Mesyuarat Kerajaan Negeri Pulau Pinang.

[16] In fact all the documents exhibited in the applicant's application clearly show that the discussions in respect of the formation of the PPS were made at the Majlis Mesyuarat Kerajaan Negeri Pulau Pinang meetings.

[17] They submit that since the applicant's main challenge on the Minister's decision is mounted upon the reason that PPS was established by the Government of Penang under s. 101 of the Local Government Act and is not a society within the meaning of the Societies Act, the express wordings of the provision of law that the applicant is relying on works against them.

[18] Section 101(v) which the applicant is relying on reads as follows:

> In addition to any other powers conferred upon it by this Act or by other written law, a local authority shall have power to do all or any of the following things, namely-
>
> (v) to do all thing necessary for and conducive to the public safety, health and convenience;

[19] Section 2 of the same Act defines "local authority" as:

> Any City Council, Municipal Council or District Council, as the case may be, and in relation to the Federal Territory means the Commissioner of the City of Kuala Lumpur appointed under section 4 of the Federal Capital Act 1960.

[20] Based on the above, they submit that the definition of the local authority does not include the State Government. Therefore, the reliance of the applicant on s. 101(v) Local Government Act to quash the decision of the first respondent is misconceived and devoid of merit.

Findings

[21] It is trite that the threshold for leave to apply for judicial review is low. See *Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* [1997] 4 CLJ 725; [1998] 1 MLJ 224 and *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] 3 AMR 35; (Civil Appeal No: W-01(1M)-367-09/2014) which reflected the adoption of a liberal approach when considering whether to give leave. However, it is equally clear that such application must fail if it is frivolous, vexatious or misconceived. In the case of *Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* (*supra*), the court held:

> … The court, in exercising its discretion that an application for leave be granted, must be convinced by the applicants that *prima facie* the application is genuine and that there is some substance in the grounds supporting the application. The test's threshold is very low; a *prima facie* case of reasonable suspicion, an arguable case must be shown, not a *prima facie* case. **Additionally, an application will fail if it is frivolous, vexatious, misconceived,** made by busybodies with misguided or trivial complaints of administrative errors, groundless, where there are more appropriate alternative remedies, and where the application for judicial review is inappropriate. (emphasis added)

[22] The applicant's had premised its case upon the fact that the Pasukan Peronda Sukarela ("PPS") was lawfully and properly established pursuant to s. 101(v) of the Local Government Act 1976. It is necessary to repeat s. 101 (v) which reads as follows:

> 101. Further powers of local authority
>
> In addition to any other powers conferred upon it by this Act or by any other written law a local authority shall have power to do all or any of the following things, namely
>
> (v) to do all things necessary for or conducive to the public safety, health and convenience;

[23] To underscore this position, the applicant has further sought a declaration that the PPS is not a society within the meaning of the Societies Act 1966. The applicant has however exhibited supporting documents

(exh. "PBP2") which show that the PPS was agreed to be established during a meeting of the Majlis Mesyuarat Negeri Pulau Pinang. All the documents exhibited by the applicant shows that the discussions in relation to the establishment of the PPS were made at the meetings of the Majlis Mesyuarat Negeri Pulau Pinang.

[24] However, the definition of "local authority" does not include the Government of Penang. Section 2 of the Local Government Act 1976 defines "local authority" as follows:

> means any City Council, Municipal Council or District Council, as the case may be, and in relation to the Federal Territory means the Commissioner of the City of Kuala Lumpur appointed under section 3 of the Federal Capital Act 1960 [Act 190].

[25] The PPS cannot exist in a vacuum. If it is not a society and therefore need not be registered under the Societies Act 1966, then it has to be set up and derive its existence and authority from some form of legislation or law. In s. 2 of the Societies Act 1966 "society" is defined as follows:

> includes any club, company, partnership, or association of seven or more persons whatever its nature or object, whether temporary or permanent, but does not include-
>
> (a) any company registered under the provisions of any written law relating to companies for the time being in force in Malaysia;
>
> (b) any company or association constituted under any written law;
>
> (c) any trade union registered or required to be registered under the provisions of any written law relating to trade unions for the time being in force in Malaysia;
>
> (d) any company, association or partnership formed for the sole purpose of carrying on any lawful business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof;
>
> (e) any co-operative society, registered as such, under any written law;
>
> (f) any organisation or association in respect of which there is for the time being in force a certificate (which may be granted, refused or cancelled at his discretion) by a person or authority appointed under the provisions of the written law for the time being in force relating to the registration of schools that such organisation or association forms part of the curriculum of a school; or
>
> (g) any school, management committee of a school, parents' association or parent-teachers' association registered or exempted from registration under any law for the time being in force regulating schools.

[26] It is therefore clear that the term "society" includes any club, company, partnership and unless it falls within any of the excepted categories mentioned in s. 2, also includes an association of seven or more persons. The employment of the phrase "includes" connotes that the subjected categories are not closed. As there is no definition of "persons" under the Societies Act 1966, resort must be made to the definition of "persons" to the Interpretation Acts 1948 and 1967 (Act 388). Section 3 of the Interpretation Acts 1948 and 1967 defines "persons" to include "body of persons, corporate or unincorporated". See *Dato' Ambiga Sreenevasan & Ors v. Menteri Dalam Negeri & Ors* [2012] 7 CLJ 43.

[27] It is also clear that until a local society is registered under the Societies Act 1966, no person shall, without a written permission of the Registrar, organise or take part in any activity of or on behalf of the society. See s. 6(3) of the Societies Act 1966. The above would indicate that if the PPS was set up pursuant to the Local Government Act 1976, then they may be exempted from registering the association under the Societies Act 1966 but not otherwise. If they were so exempted, they would arguably fall within s. 2(b) of the Societies Act 1966.

[28] As the supporting documents relied upon by the applicant show that the decision to set up the PPS was made pursuant to the decision of the Penang State Government (the applicant) and it is clear that the Penang State Government is not a "local authority", it stands to reason that the PPS could not have been set up pursuant to the Local Government Act 1976.

[29] Learned counsel for the applicant, in reply to the preliminary objections raised by the respondent submitted that pursuant to s. 9 of the Local Government Act 1976, the State Government is empowered to give directions to the local authority. Section 9 reads as follows:

> 9. Power of State Authority to issue directions
>
> (1) The State Authority may from time to time give the local authority directions of a general character, and not inconsistent with the provisions of this Act, on the policy to be followed in the exercise of the powers conferred and the duties imposed on the local authority by or under this Act in relation to matters which appear to the State Authority to affect the interests of the local authority area, and the local authority shall as soon as possible give effect to all such directions.

[30] That s. 9 empowers the State Authority to issue such directions is not in dispute. However, there are no available supporting documents before the court to show that such a power had in fact been exercised, particularly with regard to the establishment of the PPS. That being the case, I do not see how the empowering provision under s. 9 can assist the applicant in arguing that they had exercised their powers under s. 9 of the Local Government Act 1976 so as to legitimise the formation of the PPS pursuant to the provisions of the Local Government Act 1976.

[31] After hearing initial submissions from parties, I called for clarification on another date in order for parties to submit whether there was any material in the applicant's possession that could be placed before the court in order to show that the State Government had in fact resorted to the said provision in s. 9 of the Local Government Act 1976 in directing the local authority in respect of the setting up of the PPS. When parties appeared for the clarification on 23 September 2015, the applicants referred to two paragraphs in the applicant's affidavit in encl. 3 namely paras. 8 and 9 which they said factually presented how the particular body was set up.

[32] A perusal of para. 8 of encl. 3 however, reflected that the proposal for the setting up of the PPS was announced at the sitting of the Penang State Legislative Assembly on 29 April 2009 and established subsequently two years later under the order of the State Government pursuant to its proposal at the Penang State Government Executive Council Meeting on 27 April 2011.

[33] Paragraph 9 of encl. 3 averred that the PPS was formed under the executive and administrative authority of the Penang State Government and falls within the ambit of s. 101(v) of the Local Government Act 1976. The applicant made reference to exh. "PBP 2" once again and submitted that this exhibit showed that the PPS was agreed to be established during a meeting of the Majlis Mesyuarat Negeri Pulau Pinang. I fail to see how the reference to this exhibit assists the applicant as it does not reflect that the PPS was established under s. 101(v) of the Local Government Act 1976.

[34] Since the State Government does not qualify as a local authority within the definition of the said Act, the PPS could not be said to be set up pursuant to s. 101(v) of the Local Government Act 1976 as the applicant cannot show by way of documentary evidence or otherwise that it had given the requisite directions under s. 9 of the said Act. I find therefore that the PPS could not have been set up pursuant to the provisions of the Local Government Act 1976.

[35] I am mindful that at this stage of the proceedings, a consideration of the merits of the case are not to be undertaken. Nonetheless, there has to be shown that the grounds upon which the application is based has some basis. Based on the above reasons, I do not see how it can be successfully contended that the first respondent had acted *ultra vires* the Local Government Act 1976 and the Societies Act 1966 in making the order dated 3 November 2014 declaring PPS an unlawful society.

[36] Learned counsel for the applicant further sought to argue that the preliminary objection raised by the respondents only holds true for prayer no. 1 to this application which is for a declaration that the PPS was lawfully and properly established by the applicant pursuant to s. 101(v) of the Local Government Act 1976.

[37] Learned counsel therefore submits that prayer no. 1 can be severed from the rest of the prayers in deciding whether to grant leave or not. As earlier alluded to, the PPS cannot exist in a vacuum. It must have been established pursuant to some law or regulation. If the contention of the applicant is that the PPS is not a society pursuant to the Societies Act 1966 which is prayer no. 2 in the application, then it stands to reason that their legitimacy must hinge on something. That something is s. 101(v) of the Local Government Act 1976 as vigorously contended for by the applicant.

[38] It is for this very reason that the applicant is challenging the order of the first respondent which declared the PPS an unlawful society pursuant to s. 5(1) of the Societies Act 1966 (the impugned order) as being *ultra vires* and in excess of and without jurisdiction. Hence, the applicant's contention that the PPS is not a society within the meaning of the Societies Act 1966. I therefore fail to see how prayer no. 1 can be severed or taken separately from the rest of the prayers which to me all hinge upon the outcome to prayer no. 1.

[39] Logically, prayer no. 2 onwards does not make sense without prayer no. 1. Prayer no. 3, which is for an order of *certiorari* to quash the order dated 3 November 2014 made by the Minister of Home Affairs declaring PPS an unlawful society, is inextricably tied to prayer no. 1 because for PPS not to be declared an unlawful society, it must be then rendered lawful under the Local Government Act 1976. The prayers subsequent to prayer no. 3 are also to some extent consequential upon the outcome to prayer no. 1.

[40] It would thus leave the court, if leave were granted, with only having to decide whether the PPS is or is not a society within the meaning of the Societies Act 1966 pursuant to prayer no. 2 which does not make sense standing alone. The applicant further submitted that there is no decided case on the issue of whether the State Government in setting up a body such as the PPS acted in violation of s. 101(v) of the Local Government Act 1976. Put another way, does s. 101 necessarily preclude the State Government from setting up such a body? Leave ought therefore to be given for these reasons.

[41] However, it was earlier on contended by the applicant that s. 9 of the Local Government Act 1976 empowers the State Authority to issue certain directions to the local council to do certain acts. The empowering provision given to the State Authority is not in dispute as it is clearly spelt out in s. 9 of the Local Government Act 1976.

[42] There is therefore nothing novel about this issue. It is on the available evidence before this court that the applicant is hard pressed to show that the State Authority did in fact issue such directions. This argument canvassed by the applicant must therefore fail for this reason. The basic premise upon

which the applicant relies upon here *viz*. Section 101(v) of the Local Government Act 1976, is at variance with their supporting documentary evidence. The application by the applicant for leave is therefore a non-starter.

[43] I therefore uphold the preliminary objection raised by the respondents and dismiss the applicant's application with no order as to costs.